

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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ROGER HULL,

Plaintiff,

Case No. 3:12-cv-00512-MMD-VPC

ORDER

v.

GREGORY COX, et al.,

Defendants.

Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections, has filed a *pro se* civil rights action pursuant to 42 U.S.C. § 1983. Based on the financial information provided, the Court finds that plaintiff is unable to prepay the full filing fee in this matter. Before the Court is plaintiff's amended complaint (dkt. no. 9), which the Court has screened pursuant to 28 U.S.C. § 1915A. As will be discussed below, the additional claims plaintiff includes in his amended complaint are subject to dismissal for failure to state a claim for which relief may be granted. Accordingly, the Court shall strike the amended complaint, and this matter shall proceed as set forth in this Court's Screening Order dated January 15, 2013 (dkt. no. 4).

I. SCREENING PURSUANT TO 28 U.S.C. § 1915A

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a

1 claim upon which relief may be granted or seek monetary relief from a defendant who is
2 immune from such relief. See 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however,
3 must be liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d. 696, 699 (9th
4 Cir. 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
5 elements: (1) that a right secured by the Constitution or laws of the United States was
6 violated, and (2) that the alleged violation was committed by a person acting under color
7 of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

8 In addition to the screening requirements under § 1915A, pursuant to the Prison
9 Litigation Reform Act of 1995 (PLRA), a federal court must dismiss a prisoner’s claim, “if
10 the allegation of poverty is untrue,” or if the action “is frivolous or malicious, fails to state
11 a claim on which relief may be granted, or seeks monetary relief against a defendant
12 who is immune from such relief.” 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for
13 failure to state a claim upon which relief can be granted is provided for in Federal Rule
14 of Civil Procedure 12(b)(6), and the court applies the same standard under § 1915 when
15 reviewing the adequacy of a complaint or an amended complaint. When a court
16 dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the
17 complaint with directions as to curing its deficiencies, unless it is clear from the face of
18 the complaint that the deficiencies could not be cured by amendment. See *Cato v.*
19 *United States*, 70 F.3d. 1103, 1106 (9th Cir. 1995).

20 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
21 *Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal
22 for failure to state a claim is proper only if it is clear that the plaintiff cannot prove any
23 set of facts in support of the claim that would entitle him or her to relief. See *Morley v.*
24 *Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making this determination, the court takes
25 as true all allegations of material fact stated in the complaint, and the court construes
26 them in the light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d
27 955, 957 (9th Cir. 1996). Allegations of a *pro se* complainant are held to less stringent
28 standards than formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9

1 (1980); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam). While the standard
 2 under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must provide
 3 more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct.
 4 1955, 1964-65 (2007). A formulaic recitation of the elements of a cause of action is
 5 insufficient. *Id.*, see *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

6 Additionally, a reviewing court should “begin by identifying pleadings [allegations]
 7 that, because they are no more than mere conclusions, are not entitled to the
 8 assumption of truth.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009). “While legal
 9 conclusions can provide the framework of a complaint, they must be supported with
 10 factual allegations.” *Id.* “When there are well-pleaded factual allegations, a court should
 11 assume their veracity and then determine whether they plausibly give rise to an
 12 entitlement to relief. *Id.* “Determining whether a complaint states a plausible claim for
 13 relief [is] a context-specific task that requires the reviewing court to draw on its judicial
 14 experience and common sense.” *Id.*

15 Finally, all or part of a complaint filed by a prisoner may be dismissed *sua sponte*
 16 if the prisoner’s claims lack an arguable basis either in law or in fact. This includes
 17 claims based on legal conclusions that are untenable (e.g., claims against defendants
 18 who are immune from suit or claims of infringement of a legal interest which clearly
 19 does not exist), as well as claims based on fanciful factual allegations (e.g., fantastic or
 20 delusional scenarios). See *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989); see also
 21 *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

22 **II. AMENDED COMPLAINT**

23 In his amended complaint (dkt. no. 9), plaintiff, who is incarcerated at Northern
 24 Nevada Correctional Center (“NNCC”), has sued Nevada Department of Corrections
 25 (“NDOC”) Director Greg Cox, as well as several NNCC administrators and officers.
 26 Plaintiff asserts violations of his First Amendment rights, his Fourteenth Amendment
 27 equal protection rights, as well as his rights under the Religious Land Use and
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1 Institutionalized Persons Act of 2000 (“RLUIPA”), 42 U.S.C. §§ 2000cc to 2000cc-5
2 (2000).

3 Counts I through IV of plaintiff’s amended complaint are identical to counts I
4 through IV of his original complaint (dkt. nos. 5 and 9). In counts V and VI of plaintiff’s
5 amended complaint, he alleges that defendants have violated his rights to practice his
6 religion, thereby violating Nev. Rev. Stat. §§ 209.131, 209.132, 209.161. He also claims
7 that because defendants Cox, Palmer and Baca have violated these state statutes, they
8 are “directly responsible for their actions” (dkt. no. 9 at 19). The state statutes that
9 plaintiff cites describe the duties of the Nevada Department of Corrections director,
10 including the authority to delegate powers and appoint prison wardens. These statutes
11 do not provide for a private right of action; therefore, in counts V and VI plaintiff has not
12 and cannot state a claim for which relief may be granted.

13 As the only new claims in plaintiff’s amended complaint must be dismissed for
14 failure to state a claim, the Court shall strike the amended complaint. This action shall
15 proceed on the original complaint (dkt. no. 5) as set forth in the January 15, 2013,
16 Screening Order (dkt. no. 4).

17 **III. CONCLUSION**

18 IT IS THEREFORE ORDERED that plaintiff’s amended complaint (dkt. no. 9) is
19 STRICKEN.

20 IT IS FURTHER ORDERED that this action SHALL PROCEED on the original
21 complaint (dkt. no. 5) as set forth in this court’s Screening Order dated January 15,
22 2013 (dkt. no. 4).

23 IT IS FURTHER ORDERED as follows:

24 1. Plaintiff’s application to proceed *in forma pauperis* (dkt. no. 1) is
25 GRANTED; plaintiff shall not be required to pay an initial installment of the filing fee. In
26 the event that this action is dismissed, the full filing fee must still be paid pursuant to 28
27 U.S.C. § 1915(b)(2).

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1 2. The movant herein is permitted to maintain this action to conclusion
2 without the necessity of prepayment of any additional fees or costs or the giving of
3 security therefor. This order granting leave to proceed *in forma pauperis* shall not
4 extend to the issuance of subpoenas at government expense.

5 3. Pursuant to 28 U.S.C. § 1915(b)(2), the Nevada Department of
6 Corrections shall pay to the Clerk of the United States District Court, District of Nevada,
7 20% of the preceding month's deposits to plaintiff's account (inmate #68989), in the
8 months that the account exceeds \$10.00, until the full \$350.00 filing fee has been paid
9 for this action. The Clerk of the Court shall SEND a copy of this order to the Finance
10 Division of the Clerk's Office. The Clerk shall also SEND a copy of this order to the
11 attention of the Chief of Inmate Services for the Nevada Department of Corrections,
12 P.O. Box 7011, Carson City, NV 89702.

13 4. The Clerk shall electronically SERVE a copy of this order, a copy of the
14 Screening Order dated January 15, 2013 (dkt. no. 4), and a copy of plaintiff's complaint
15 (dkt. no. 5) on the Office of the Attorney General of the State of Nevada, attention Kat
16 Howe.

17 5. Subject to the findings of the Screening Order (dkt. no. 4), within twenty-
18 one (21) days of the date of the entry of this order, the Attorney General's Office shall
19 file a notice advising the Court and plaintiff of: (a) the names of the defendants for
20 whom it accepts service; (b) the names of the defendants for whom it does not accept
21 service; and (c) the names of the defendants for whom it is filing last-known-address
22 information under seal. As to any of the named defendants for whom the Attorney
23 General's Office cannot accept service, the Office shall file, under seal, the last known
24 address(es) of those defendant(s) for whom it has such information.

25 6. If service cannot be accepted for any of the named defendant(s), plaintiff
26 shall file a motion identifying the unserved defendant(s), requesting issuance of a
27 summons, and specifying a full name and address for the defendant(s). As to any of
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1 the defendants for whom the Attorney General has not provided last-known-address
2 information, plaintiff shall provide the full name and address for the defendant(s).

3 7. If the Attorney General accepts service of process for any named
4 defendant(s), such defendant(s) shall file and serve an answer or other response to the
5 complaint within sixty (60) days from the date of this order.

6 8. Henceforth, plaintiff shall serve upon defendant(s) or, if an appearance
7 has been entered by counsel, upon their attorney(s), a copy of every pleading, motion
8 or other document submitted for consideration by the Court. Plaintiff shall include with
9 the original paper submitted for filing a certificate stating the date that a true and correct
10 copy of the document was mailed to the defendants or counsel for the defendants. If
11 counsel has entered a notice of appearance, the plaintiff shall direct service to the
12 individual attorney named in the notice of appearance, at the address stated therein.
13 The Court may disregard any paper received by a district judge or magistrate judge
14 which has not been filed with the Clerk, and any paper received by a district judge,
15 magistrate judge, or the Clerk which fails to include a certificate showing proper service.

16 || IT IS SO ORDERED.

DATED THIS 23rd day of May 2013.


MIRANDA M. DU
UNITED STATES DISTRICT JUDGE